

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
ECKHART, et al., : Docket #1:20-cv-05593-
 : RA-GWG
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 Plaintiffs, :
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 - against - :
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 FOX NEWS NETWORK, LLC, et al., : New York, New York
 : February 14, 2022
 Defendants. :
 : TELEPHONE CONFERENCE
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PROCEEDINGS BEFORE
THE HONORABLE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiffs: WIGDOR LLP
BY: RENAN F. VARGHESE, ESQ.
85 Fifth Avenue, 5th Floor
New York, New York 10003
212-257-6829

For Defendants Fox News: PROSKAUER ROSE LLP
BY: KATHLEEN MCKENNA, ESQ.
RACHEL SARAH FISCHER, ESQ.
11 Times Square
New York, New York 10036
212-969-3130

Transcription Service: Carole Ludwig, *Transcription Services*
155 East Fourth Street #3C
New York, New York 10009
Phone: (212) 420-0771
Email: Transcription420@aol.com

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APPEARANCES CONTINUED:

For Defendant Ed Henry: MORVILLO, ABRAMOWITZ, GRAND,
IASON & ANELLO P.C.
BY: CATHERINE FOTI, ESQ.
565 5th Avenue
New York, New York 10017
212-880-9530

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE CLERK: We're here in the matter of Eckhart et al v. Fox News Network et al, case number 20-cv-5593.

Could we have appearances of counsel, beginning with the plaintiff?

MR. RENAN VARGHESE: Good afternoon, your Honor. This is Renan Varghese from Wigdor LLP for the plaintiff, Jennifer Eckhart.

MS. KATHLEEN MCKENNA: Good afternoon, your Honor. Kathleen McKenna from Proskauer Rose, joined by my colleague, Rachel Fischer, who will be handling this conference.

MS. RACHEL FISCHER: Good afternoon.

MS. CATHERINE FOTI: Good afternoon, your Honor. It's Catherine Foti from Morvillo, Abramowitz, Grand, Iason, & Anello, P.C., on behalf of Ed Henry.

HONORABLE GABRIEL W. GORENSTEIN (THE COURT): Okay. Welcome, everyone. This is a recorded line, but any further recording or dissemination of the proceeding is forbidden. Also, anyone who's not speaking should keep themselves on mute.

We're here based on two letters, February 4th and February 8th, dockets 192 and 193. I've read the letters, but, you know, we should go over them. And we'll do them one issue at a time. So I'll hear from plaintiff

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2 as to the first issue.

3 MR. VARGHESE: Thank you, your Honor. And this
4 is Renan Varghese from Wigdor. The first issue that we
5 identified in our initial correspondence report is the
6 issue of the discovery of other complaints of
7 discrimination, harassment, sexual assault and rape. Just
8 by way of background, we represent Jennifer Eckhart, who
9 is a former associate producer at Fox News, and we allege
10 that while Ms. Eckhart was employed by Fox News, she was
11 sexually assaulted and raped by one of the anchors for the
12 company, Ed Henry, and that she complained about his
13 conduct and was subsequently terminated in retaliation for
14 her complaint. Both Fox News and Ed Henry moved to
15 dismiss Ms. Eckhart's claims; and as part of Fox News'
16 motion to dismiss, it argued that Ms. Eckhart never
17 engaged in protected activity.

18 I've alleged in the Complaint Ms. Eckhart never
19 used the term "sexual harassment" or, quote/unquote,
20 "rape" in her Complaint, but she did complain about an
21 abusive and toxic working environment. And, as we
22 explained in opposing Fox News' motion to dismiss, given
23 the other complaints of harassment, discrimination and
24 sexual abuse that Fox News received before Ms. Eckhart's
25 complaint and in and around when Ms. Eckhart had

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complained about the sexual abuse and rape, that Fox should have known that what Ms. Eckhart was complaining about or speaking about was about sexual misconduct. And even if Fox didn't know, which is what Fox News has contended, it should have known, given the larger context. And so that is one of the reasons --

THE COURT: Is there anything in Judge Abrams' decision or anywhere else that says the standard is "should have" as opposed to what they understood? I mean, you can only retaliate against someone for a reason, and the reason is one you know about, not one that you should have known. I mean, they would have to actually understand it, right? They would have to actually believe that she was complaining about protected activity for them to be liable for retaliation, right?

MR. VARGHESE: No, that --

THE COURT: It doesn't matter as much for what we're doing today, but I was just surprised you said that.

MR. VARGHESE: Well, no, I don't think that's exactly accurate, your Honor. You can't -- case law is clear that you can't look at a complaint of discrimination in isolation. And you have to look at it in the larger context of the -- what's going on and what the human resources recipient and the company knew and what is

reasonable for them to know. That goes to the whole line of cases saying that there are no magic words required in order to engage in protected activity. It's not a matter of the plaintiff used this language, and based on this language it's clear that the defendant knew. It's the plaintiff -- given everything, what the plaintiff said and given the larger context of her complaint, that is what is necessary to examine in order to determine whether the company could fairly have been considered to be on notice. The standard is not you didn't use the right words, so we can stick our head in the sand and we don't have to do any further investigation, and you're out of luck. That's not the way the case law has viewed those kind of complaints. And I would point the Court to the *Lenzi v. Systemax* case, Second Circuit 2019 decision where the Court reversed summary judgment where the district court read the case in isolation and said that instead that the Court needs to read the Complaint in context to determine whether, quote, "it reasonably suggested," end quote, that the plaintiff was engaging in protected activity.

So it's not that Fox News can just say, "We didn't think this was protected activity. That is the end of the analysis," because, I mean, if that were the case, then there's no -- then Judge Abrams should have dismissed

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the retaliation case in its entirety. The issue should be permitted to go to discovery. And one of the things we need to prove in discovery is that, given the larger context of the other complaints that were made around the time before Ms. Eckhart complained about -- made her own complaint about the sexual abuse and rape that she was subjected to, Fox should have known. And the only way for us to do that -- Fox says in their opposition letter that we should just ask their employees what they understood the complaint to mean. But, with all due respect, that's not the issue here. And also, that's not how employment discrimination cases work. It's not a matter of you take a deposition and you ask, "Did you discriminate against the plaintiff?" Answer, "No." Well, I guess case withdrawn, then, because there's nothing left to say. Under Fox News' argument, there would be no need for document discovery.

That's not the (indiscernible). We're entitled to look at the other complaints and the specific language used in those complaints to see whether or not Fox should have been on notice of Ms. Eckhart's complaint. For example, if -- and, again, this is just a hypothetical; I'm not saying this is what happened. But, if, for example, we have -- based on public reporting, we know

1 that Gretchen Carlson and Megyn Kelly both thought they
2 were subject to sexual harassment at Fox. If they used
3 the same language that Ms. Eckhart used, if they said, "We
4 believe we were subject to abuse and a toxic work
5 environment," then Fox would have known that those kinds
6 of statements are statements that women who are afraid to
7 explicitly invoke "sexual harassment" or "abuse" or "rape"
8 use in making complaints of discrimination and that it
9 would have been unreasonable for Fox to just look at the
10 explicit language that Ms. Eckhart used in her -- in
11 speaking to Fox when deciding whether or not to engage in
12 protected activity.
13

14 That is the first prong as to why we believe
15 those documents are relevant --

16 THE COURT: Just to finish out on that prong, I
17 mean, I think part of what you're talking about relates to
18 substantive issues of discrimination and maybe not
19 necessarily about judging whether someone has retaliated
20 for protected activity. But let's put that to the side
21 for the moment. Let's assume you're right. What's the
22 limiting principle on this? Do we have discovery on
23 twenty different complaints as to what they were, whether
24 they really were sexual harassment or not? What's the
25 limiting principle here, or is there none?

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MR. VARGHESE: I don't know that there's a way to fairly apply a limiting principle. The question isn't -- you know, in other cases that I have litigated where there have been -- where we're talking about a huge company with a -- where there are, you know, dozens and dozens of complaints of discrimination, we have taken a sampling or done something along those lines to give a fair representation of the other complaints. But first, I don't know that we are talking about dozens and dozens.

If, you know, your Honor is right and if it is twenty --

THE COURT: No, but it's not so much the number of complaints; it's what do you get for those complaints. For example, if one of the complaints is someone -- I mean, I'm not sure if these are written or there's notes of them or whatever it is -- let's assume there's some document that's reflective of the complaint, either, you know, some form that's filled out afterwards or -- something, do you just get that, or do you then get to do discovery on that complaint to see whether it was really a complaint of sexual harassment or misconduct?

MR. VARGHESE: Well, I don't think for the purposes of this case, I don't think it matters whether it was ultimately found to be that the individual was the victim of sexual harassment or misconduct. I think for

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2 this issue, I think the language that was used and how Fox
3 interpreted it are the key points. So, for example, going
4 back to my hypothetical --

5 THE COURT: So all you need is that initial --
6 all you need is that initial whatever it is, the note of
7 the meeting or the document containing the complaint?

8 MR. VARGHESE: No, because it's also -- no for
9 two reasons. One, it's also how Fox interpreted the
10 complaint. So if an employee came to Fox and said, "I
11 feel like I have been subject to abuse and a toxic work
12 environment," which is what Ms. Eckhart says, but if
13 another employee came to Fox and said that and then Fox
14 believed that that was a sexual harassment complaint or
15 sexual misconduct complaint and proceeded to investigate
16 that complaint based on the language that we've used, that
17 would show that Fox easily should have known that
18 Ms. Eckhart herself was complaining about sexual
19 harassment, sexual abuse, even though that wasn't the
20 language that she used, that that's how Fox interpreted --

21 THE COURT: Right. So I think -- I think
22 you're -- I think that that suffers from perhaps a
23 disassociation with reality because if the employer gets a
24 complaint of toxic work environment, you know, I mean
25 unless they have some form that says, "We shall

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investigate this as sexual harassment," as opposed to we just shall investigate this, I don't know how you ever get to the point where you find out whether they investigated it as sexual harassment.

MR. VARGHESE: Well, but I guess that is what my point is when your Honor is asking is the only thing that we're entitled to the documents about the language of the complaint and what -- the form your Honor hypothesized might exist. This is why the investigation itself is important, both to this factor and to the Faragher-Ellerth defense that Fox has pled, which is what the --

THE COURT: I really want to keep these separate, if you don't mind. Let's figure out what you're entitled to under this theory, and then we'll talk about the other one. Okay?

MR. VARGHESE: Okay.

THE COURT: So I'm still not buying it here, because the way Judge Abrams, it seems to me, framed it -- and I think that is what should guide us here -- is are there actually complaints -- the way I think she framed it was were there a whole bunch of complaints of sexual harassment and misconduct; and therefore when the next person who came in with a complaint that didn't use the magic words, should they -- was that really understood by

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2 them to be a complaint about sexual harassment. So it's
3 not that you look at prior complaints of toxic
4 environment; you look at prior complaints of sexual
5 harassment along with that.

6 MR. VARGHESE: I agree with that, your Honor;
7 that's 100% true. But the issue is not did the plaintiff
8 state, "I am complaining about sexual harassment." Did
9 she use the words "sexual harassment" --

10 THE COURT: The plaintiff or the complainer?
11 I'm sorry, who's --

12 MR. VARGHESE: Sorry, the complainer -- I'm
13 sorry, I apologize for my inartful language. The question
14 is whether the individual who is making the complaint, if
15 not, did they say, "I am complaining about sexual
16 harassment," or "I am complaining about sexual
17 misconduct," or, "I'm complaining about sexual abuse."
18 That's not the standard. The standard isn't you have to
19 trigger -- you have to use specific language or, as the
20 case law likes to refer to it, you have to use specific
21 magic words in order to make out -- in order to engage in
22 protected activity. That is --

23 THE COURT: Okay, I'm not saying -- I'm not
24 saying you have to use magic words, but there would have
25 to be something in there -- I'm not talking about your

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client, because that's where we get into the no-magic-words-required problem. Here we're talking about one step removed from that, which is we're trying to figure out what Fox understood or your formulation should have understood from the plaintiff's complaint. And we're going one step away from that to say, well, let's -- to figure out what's going on, let's look at some other complaints. And I'm trying to figure out what the limiting principle is. And maybe you'll say there is none, because if there is none, then any complaint by anybody -- maybe presumably female -- I don't know if your Complaint is saying it's only females who were harassed -- has to be -- about their work environment has to be looked at, has to be figured out exactly what the complaint was, you have to track the investigation and then figure out what was found in that investigation. And that's -- we have to do a full discovery, emails, everything, to figure out what happened in that person's case. So if that's your reason, tell me; and if it's not, tell me what the limiting principle is.

MR. VARGHESE: No, I think your Honor is correct that we do have to look at more than just the language of the complaint. And I will point your Honor to Judge Abrams' decision, and specifically, page 39 of her

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decision where she states -- and I'm just going to quote from the decision -- "Concededly, however, she," referring to Ms. Eckhart, "did not explicitly mention sexual harassment or misconduct when she made this complaint. Yet, she asserts that Hurst and Collins nonetheless understood that she was complaining about unlawful sexual harassment at the time. She urges that her complaint to Collins and Hurst must be read in context. In the years immediately preceding this complaint, Fox News received complaints of sexual harassment and sexual misconduct by over 25 female employees. Given that context" --

THE COURT: Twenty, but go ahead.

MR. VARGHESE: I'm sorry, "-- by over 20 female employees. Given that context, Eckhart contends that it would be reasonable for an executive at the network to understand her reference to the abuse and hostility she endured as a reference to sexual abuse or gender-based harassment. She also notes that, upon her termination in June 2020, Collins, who was present when she made her initial complaint in February 2020, asked her if she had been sexually harassed and/or assaulted while employed by Fox News. She reasoned that Collins asking her this question upon her exit from the company suggests that Collins understood Eckhart's initial complaint to have

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been about sexual harassment and/or assault, which would render this protected activity. Viewing the allegations in the light most favorable to Eckhart, the Court finds this inference to be plausible."

THE COURT: I'm familiar with it. I've been having this entire discussion with you having read that several times. So why did you just repeat it? Explain it to me.

MR. VARGHESE: Well, the whole point is that you can't look -- it's not just the language of the complaints that other employees made that's relevant; it's how Fox interpreted that language and how Fox responded to that language, because that's the only way that a Court could or ultimately a fact-finder could ultimately decide whether or not Fox reasonably should have known that Ms. Eckhart was complaining about sexual harassment, sexual abuse and sexual misconduct despite the fact that she didn't invoke that specific language. And --

THE COURT: We're going in circles here. I keep asking you what's the limiting principle. Do you for each of those twenty complaints get to go through the entire investigation, all the emails about how that particular person was treated, depose that person to find out how that was treated, depose the people who -- her boss to

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find out what happened? What's the limiting principle here? Or is there none, in which case, just tell me that.

MR. VARGHESE: I think the limiting principle in the sense that your Honor's talking about it is that we would limit it to complaints made by female employees. At this point we do not intend to depose all -- we don't intend to depose these employees who made these complaints because at the end of the day, the question is what Fox should have known or understood based on the content of these complaints. So what we would use those complaints for is to speak to the relevant individuals at Fox who either received these complaints or subsequently investigated these complaints and then decide -- and based on that, show that Fox knew or reasonably should have known that Ms. Eckhart was complaining about or was engaging in protected activity.

THE COURT: Okay, well, now we're getting somewhere. So I wrote down what you said. It sounds like you want the actual complaints, which, you know, presumably are in writing, because that's the only way you'd get them. And you want to depose Hurst and Collins about what they knew about them. Is there something more, or am I misunderstanding you?

MR. VARGHESE: That is -- well, not just

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Collins. To the extent that other people, for example, if another person received a complaint at Fox's HR and that person -- because Collins reports up to Kevin Lord, who's the vice president of human resources. If, for example, another HR person received a similar complaint and told Kevin Lord that this -- "I think this complaint that didn't mention sexual harassment or abuse, misconduct, etc., was actually complaining about such misconduct," then I think that would be relevant, as well.

THE COURT: Okay. So you want complaints to HR by females about something -- complaints about work environment in some time period we haven't established yet before your client did so, and then you want to be able to depose some people in HR -- we're not sure who yet -- about them. But that's it. In terms of document requests, what you want are the complaints?

MR. VARGHESE: Yes, we want to see the complaints, and we want to -- but we also want to see Fox's response to the complaints, like, to see whether or not Fox investigated -- I'm sorry?

THE COURT: There's someone who doesn't have their line muted. If they can mute it, please?

You want to see Fox's response?

MR. VARGHESE: Yes, the investigations of the

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complaints. And I know your Honor doesn't want to get into the Faragher-Ellerth issue, so I'll --

THE COURT: Not yet. No, no. I want to see what you can justify just on this.

MR. VARGHESE: Understood, your Honor.

THE COURT: Okay. So Fox's response. Well, that could be -- I'm not sure what you mean by that, the response to the complainant or the series -- the entire investigation that then occurred after this complaint, including all the emails and everything else?

MR. VARGHESE: Well, for this point, for the notice point alone -- and, again, I'm not referring to the Faragher-Ellerth issue -- we just want to see whether or not an investigation was done.

THE COURT: Whether or not.

MR. VARGHESE: Based on the language that was -- based on the complaint itself, whether or not the complaint -- that Fox believed the complaint was sufficient to warrant a subsequent investigation.

THE COURT: Okay. Now you can go onto Faragher-Ellerth.

MR. VARGHESE: Okay. Thank you, your Honor. Just to be clear, these are the same document requests, but in this context we do want to see the actual

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investigations that Fox conducted. We don't necessarily need to see every single email reviewed or every single person who was interviewed; but to the extent that there was an investigative report which summarized what happened, that would be the, to use your Honor's words, the limiting factor for the Faragher-Ellerth defense or rather, the Faragher-Ellerth --

THE COURT: But let's talk -- before we get to documents, let's talk about the bigger picture on this. So you say in this Little case that supervisors routinely -- evidence of supervisors routinely dismissing complaints by nonparty employees was found relevant, right?

MR. VARGHESE: Yes, your Honor.

THE COURT: Do you have Little in front of you?

MR. VARGHESE: I can pull it up.

THE COURT: I don't think it's nonparties. The same thing for (indiscernible). You tell me if I'm wrong. Take your time.

MR. VARGHESE: I think your Honor's right about Little, looking at it now.

THE COURT: All right, well, it was a critical, logical underpinning of your argument. You've got to be really careful when you write parentheticals, all right?

MR. VARGHESE: Understood, your Honor.

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2 THE COURT: It causes me to lose -- it will
3 cause me to lose trust in you when I see something like
4 that. When I read it, I thought, wow, nonparties; it
5 really stood out at me. And then when I looked at the
6 case, it was wrong. So --

7 MR. VARGHESE: I'll give you -- I'll provide
8 your Honor --

9 THE COURT: So I'm not sure -- sorry?

10 MR. VARGHESE: Well, I can provide your Honor
11 with a case, if your Honor wants a different case.

12 THE COURT: Well, let's talk about the logic of
13 this, because I think the defendants have cited cases
14 saying otherwise. Maybe you want to talk about those.

15 MR. VARGHESE: Yes, I will talk about those. I
16 think the -- I'm not saying there are no cases where --
17 I'm not saying -- let me take a step back. I'm not saying
18 solely by virtue of the fact that a defendant cites to the
19 Faragher-Ellerth defense, that every single complaint and
20 investigation becomes relevant. That is not what --
21 that's not the point of our argument in this case.

22 The point of our argument in this case is that
23 defendants have stated that Ms. Eckhart didn't engage in
24 protected activities. We disagree with that. If the
25 Court or the fact-finder ultimately decides that

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Ms. Eckhart did engage in protected activity, the Faragher-Ellerth defense would not be an issue, we would contend. And perhaps the Court would disagree with --

THE COURT: Say that last sentence again. I didn't follow that. Say it again.

MR. VARGHESE: If Ms. Eckhart did engage in protected activity, we would contend that Faragher-Ellerth wouldn't act to bar her claims because then defendants can't show that she unreasonably failed to take advantage of the --

THE COURT: Right. That's why -- that's why we're talking about this. You want to be able to say --

MR. VARGHESE: Right.

THE COURT: -- oh, it wasn't a real *bona fide* system; and, therefore, she didn't have to participate -- I'm sorry, not that she didn't have to participate -- not a *bone fide* system -- yes, that she didn't have to participate in, exactly.

MR. VARGHESE: Yes, your Honor. And that if they are -- if it turns out that what Ms. Eckhart had stated was not sufficient to engage in protected activity and they -- ultimately the Court or a fact-finder decides that she needed to be more explicit about her complaint and link it more explicitly to sexual harassment or sexual

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2 misconduct, then what we're trying to show here is because
3 of the fact that defendants are saying that the language -
4 - her -- that her fear of reprisal was unreasonable and
5 that's why the Faragher-Ellerth -- and so the Faragher-
6 Ellerth defense bars -- she's out of luck.

7 But what we're trying to show is that the reason
8 she didn't want to explicitly use terms like "rape" or
9 "sexual assault" and "sexual harassment" was that based
10 on -- even based on public reporting at the time, there
11 was a concern at Fox News, and particularly amongst female
12 employees at Fox News, that if they complained, that they
13 would be retaliated against. And so the issue that we're
14 trying to get at with these document requests is to show
15 that that kind of concern was her concern and the reason
16 she didn't use more explicit language was reasonable,
17 given the circumstances.

18 THE COURT: Okay. I understand why you want to
19 do it. I'm trying to understand again the limiting
20 principle or maybe there is none. And I'm not saying
21 you're entitled to it at all, but I just need to
22 understand where you're going with this.

23 MR. VARGHESE: I don't --

24 THE COURT: So, first of all, the cases that are
25 cited by the defendant, they're just wrong or they're

1
2 distinguishable?

3 MR. VARGHESE: I think they're incorrect in the
4 larger context of what we know and what our client
5 understood about Fox News and the way that it responded to
6 such cases in the past. It's not a situation where you're
7 talking about a plaintiff just saying on her own, without
8 any basis, "I didn't feel comfortable going to -- I didn't
9 feel comfortable going to HR, I didn't feel comfortable in
10 making a more explicit complaint." Ms. Eckhart's
11 complaints have to be looked at in the larger context of
12 how a -- of the environment at Fox News and a concern that
13 admittedly and reportedly was shared by a lot of other
14 women. And so the fact that these other women shared her
15 concerns, and to the extent that these women talked about
16 those concerns to Fox or Fox was aware of them I think is
17 all relevant to the efficacy of Fox's policies and whether
18 or not Ms. Eckhart's decision not to use more explicit
19 language in her complaints was reasonable, given the
20 circumstances.

21 Again, I think the issue really comes down to
22 given the circumstances. I don't think an issue like this
23 can be examined just based on a blanket rule saying that
24 other complaints are not relevant in any case where
25 Faragher-Ellerth defense is applied. I think there has to

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be some limited -- there has to be some principle as to when such complaints are relevant and when such complaints are not relevant. Here it's not -- again, I think that it's important to take into account the history of Fox News, the reporting about Fox News and the reporting about how women at Fox News looked at the company and looked at HR because it goes into things that Ms. Eckhart herself took into account when she decided to use the language that she used. And so that is what makes these things relevant.

And in terms of the limiting principle, again I would say that we would look to the nature of the complaint and any kind of report about the investigation into the complaint.

I'm sorry?

THE COURT: We have someone who's not on mute. If necessary, I can get into our system to mute everybody. But I'm going to once again ask anyone to put themselves on mute if they're not speaking.

THE COURT: Okay. Were you finished, or do you have more? It sounds like this is justifying the same thing you wanted before, the complaint -- I wrote this down -- the complaints and their response or whether or not they responded.

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2 MR. VARGHESE: That's correct, your Honor.

3 THE COURT: Okay. All right, let me hear from
4 Ms. Fischer.

5 MS. FISCHER: Good afternoon, your Honor. Would
6 you like me to start with the first argument that was
7 raised about whether the other complaints inform whether
8 the plaintiff engaged in protected activity?

9 THE COURT: You can do it any way you like.

10 MS. FISCHER: Okay. Well, I think it's
11 important to note at the outset what it is that plaintiff
12 has sought here, which I understand you talked about some
13 limiting principles on this call, but she had thought all
14 complaints of gender discrimination at the company over a
15 lengthy period of time, including electronic discovery
16 that yields 100,000 documents which Fox would need to
17 review and analyze for responsiveness based on the search
18 terms that were provided. So it's quite expansive in
19 terms of what plaintiff is seeking here.

20 THE COURT: Well, let's -- let me help you out
21 here, because if I'm going to do this, I'm going to limit
22 it just the way I talked about here, and Mr. Varghese, you
23 talked about, which is the actual complaint and some
24 document that's the response, not some kind of email
25 search. But go ahead.

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MS. FISCHER: Thank you. The first rationale the plaintiff provides --

THE COURT: Maybe now that you know that, maybe it's not -- maybe I've brokered this for you. Is there still objection or --

MS. FISCHER: There is still objection.

THE COURT: Okay, go ahead.

MS. FISCHER: So the first rationale that plaintiff provided, which is this argument that looking at other people's complaints will inform whether she participated in protected activity, whether she made a complaint of sexual harassment. The problem with this argument that plaintiff has asserted today and in her letter is that it all comes down to how did Hurst and Collins understand her statement at the time; did they understand her to be complaining of sexual harassment or not. And the way to get at that is to ask them, what did Ms. Eckhart say in the meeting, what did you understand her to be complaining about and why. This isn't a subject of, well, if we look at all these other things and maybe there's some thread we can put together to link these various statements. The question is what did they understand at the time, not to your Honor's point, should have known, but what did they actually understand. And

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there's a very simple way to get at that, which is to ask them. It's still --

THE COURT: Well, Mr. Varghese says I'm wrong. He says that there's a "should have" component.

MS. FISCHER: I think as a matter of fact you can't have a "should have" component on a retaliation claim because retaliation claims, you can only retaliate against someone for engaging in protected activity if you're aware that they engaged in that protected activity. If you're not aware, you didn't understand the complaint to be a complaint falling under that category of protected activity, then by definition it's not unlawful retaliation. That "should have" component we completely disagree with. And this is a whole fishing expedition into well, maybe we can link a bunch of things together and put together something that, you know, maybe looks like there's some rational reason why somebody should have known something they didn't know, that's not what the law provides for. The question is what did they know at the time. And the way to get at that is to ask them that question, ask them their recollections of the meeting, and you'll have an answer.

It doesn't require this, you know, significant discovery, which even as limited, it's still confidential

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information, it's still information relating to third parties who have nothing to do with any of this. And there's really -- it's not warranted in this case. And none of the rationales that were given for -- that were provided by plaintiff's counsel really hold any water in this case and authorize the disclosure of this information. They've certainly cited no case on this. We're not aware of any case where a Court has ordered this type of discovery for the purpose of ascertaining whether the plaintiff engaged in protected activity. And we don't think there's a basis for it here.

THE COURT: Okay. Anything else?

MS. FISCHER: On -- would you like me to get into the Faragher-Ellerth or --

THE COURT: This is your chance to say what you wish to say. Just I couldn't tell if you were done or not.

MS. FISCHER: Okay. So on the Faragher-Ellerth point, again, plaintiff is claiming that she needs this broad discovery about, you know, other complaints of discrimination, other investigations at Fox, in order to ascertain how Fox responded to her alleged complaint. So she's saying that Faragher-Ellerth requires a disclosure of all of this information, but we've cited cases on this.

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This exact argument has been rejected by Courts in this district. The question on a Faragher-Ellerth defense is what did -- how did the company respond to the plaintiff's complaint, not how did they respond to other people's complaints. And I understand plaintiff making this argument that, well, she saw things in the news that made her hesitate to come forward. Okay, I mean, she can testify to that, she can take that position that she had some good-faith basis not to complain or not to use words that would reasonably put someone on notice that she was complaining of harassment. She can certainly make that argument, but that doesn't mean she gets discovery into all of these other people's complaints and what they said and what they complained about. That will inform nothing as to the Faragher-Ellerth defense. That will inform nothing as to whether Fox responded appropriately or not as to the plaintiff in this case, Ms. Eckhart. So on that basis, you know, plaintiff again has not cited any case law that would authorize the disclosure of this significant information in this context. And, in fact, the cases go exactly contrary to the position that she has articulated here.

THE COURT: All right --

MS. FISCHER: As --

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THE COURT: Yes. I'm sorry. I thought you were done. Go ahead.

MS. FISCHER: No, I know she subsequently in her second letter asserted a third argument. I don't know -- I mean, that hasn't been addressed on this call; but if you would like to, I'm happy to address it.

THE COURT: I'm not dealing with the other letters today. In fact, if I forget to, at the end remind me that I'm going to talk about those, when we're going to deal with those letters or how.

No, I have what's before me. The --

MR. VARGHESE: I'm sorry, your Honor --

THE COURT: Yes.

MR. VARGHESE: I'm sorry, can I just make one point? I promise not to belabor it; I just want to clarify one issue.

THE COURT: Go ahead.

MR. VARGHESE: When your Honor said that you are not inclined to order any kind of email searches because I said I don't want emails, when I said I don't want emails, I was referring to -- I believe you -- and perhaps I misheard your Honor -- and I apologize -- I believe your Honor made reference to the fact do we want to see the emails that Fox reviewed as part of the investigation.

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But to the extent, for example, that -- and I know your Honor doesn't want to get into the second letter today, so I won't -- again, I won't belabor this -- but to the extent that if an individual put Fox on notice or it made a complaint of discrimination by email, we do think that that would still be relevant, that just because it's in an email doesn't mean that we shouldn't be entitled to it. I just wanted to clarify that when I said we don't want the emails, I wasn't referring to if the complaint itself was in an email.

THE COURT: Got it.

Okay, here's my ruling on this. I'm inclined to agree with the defendants on the Faragher-Ellerth issue. But Judge Abrams was pretty clear in finding prior complaints of sexual harassment and sexual misconduct to be subject to an inference that they would put the defendants on notice that when a female came in to complain about a toxic work environment, that was a sexual harassment complaint, and they would have understood it that way and they might have taken action because they -- you know, and the allegation is that they took action because it was that sort of complaint. So that's the reality here is we have that part of Judge Abrams' opinion. And I just don't think it's enough to say,

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"Well, just ask the people and see what they thought." I think the plaintiffs are entitled to a little bit more.

And the little bit more here would be the actual complaints, whether they came in by email or some other form, to human resources, within some reasonable time period prior to the plaintiff's complaint and to some responsive document as to how that was disposed of. So there should be no burden. The thing that I'm concerned about is are defendants -- obviously, (indiscernible) is with the privacy of the people who complained. And so I think a lot has to be done to preserve that, certainly designating as confidential, maybe even Attorney's Eyes Only, because the people who complained should not be dragged into the -- their names should not be appearing in any public record, at least not at this stage. So that's my ruling on that. There should be that production.

Any questions about the ruling before we go to the next issue?

MS. FISCHER: Yes, your Honor.

THE COURT: Mr. Varghese, anything?

MR. VARGHESE: No, your Honor.

THE COURT: From defendant?

MS. FISCHER: Yes, your Honor. Because in this case the question is what Hurst and Collins understood,

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shouldn't the complaints be limited -- the production of any complaints be limited to the complaints that they received?

THE COURT: Yes, well, let's talk about that. That is a point that got jumped over. And the plaintiff talked about it a little bit. I need to understand a little more about who's getting complaints, how, when and where. Are these two people -- I mean, what matters is, you know, the chain of decision-making, as to who made the decision to terminate, and, you know, whether they were being advised by Hurst, Collins -- I mean, not "advised," but whatever the right word is; were they working with Hurst, Collins, was there a relationship there; are they people in New York, are they some other place. So if you want to talk about that, Ms. Fischer, go ahead.

MS. FISCHER: Sure. So Mr. Hurst was Ms. Eckhart's boss. He's not a human resources employee; he's been production. And Ms. Collins is senior vice president of human resources. And Ms. Eckhart alleges that she complained to the two of them at a meeting. Now, the --

THE COURT: I mean Collins -- here's what you have to get around, Ms. Fischer. Collins is, I assume, part of a unit, the human resources unit, which shares

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information and might -- and, you know, doesn't operate in some compartmentalized way. If this was General Motors with -- I'm not sure that's the right example -- but some company with a million offices all over the place, maybe that would be less true. But -- and I'm not sure I can really figure this all out right now, but if Collins is a high-level or even a medium-level person in human resources and is prone to get information and if human resources shares it with the person who does -- shares the information with the person who does the firing, then I'm not sure we can just say, "Oh, this only goes to people who happen to complain to Collins or Hurst."

MS. FISCHER: Well, Hurst was the -- Hurst and Collins were involved in the performance management of the plaintiff, including her PIP, her Performance Improvement Plan that she was placed on and then her subsequent termination. There was no -- you know, I don't believe there was -- it's not as if they were reporting to somebody else; Hurst was her boss. Hurst was the person to whom Ms. Eckhart reported. And --

THE COURT: Okay. Let's focus on Collins, because I assume that, whenever there's a complaint of this kind, somehow human resources is going to hear about it. And I assume that's how you're going to look for

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these complaints. I assume they have some kind of system of logging this. And you're going to see, well, you have these females complaining in the previous X number of years. And it's going to be from some human resources source. Is that the way this company operated or not?

MS. FISCHER: I think that that's correct, yes.

THE COURT: Okay. So --

MS. FISCHER: It would be some human resources source.

THE COURT: Yes. And, presumably, the human resources people don't operate in their personal little bubble so that Collins just deals with her stuff and never tells anyone at human resources of anything else. And to the extent that someone complains about another boss and went to a different human resources vice president, that that isn't something that is not shared. So, you know, it's hard to see how you're going to limit it. I mean, maybe if you told me they were offices that weren't talking to each other, we could talk about that. But, in the absence of that, I'm not sure I'm going to see a way to limit it. And if you guys want to try to work this out, I'd love it to not have to deal with it now. But if you want me to try to rule on it, go ahead.

MS. FISCHER: Well, I think as a matter of

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facts, if the argument is, you know, there may have been something that Hurst and Collins heard at some other point in time that, you know, should have caused them to interpret Eckhart's complaint as one of sexual harassment, it would have to be something that they knew. And if there were something that Collins -- the level of detail did not come across; you know, if somebody says, oh, so-and-so complained and I'm investigating it or something like that, you know, somebody who works in HR -- I mean, there would have to be a level of detail in order for information about these other complaints to be informative on that overall question of what did Collins know. It wouldn't be enough for her to just have known, okay --

THE COURT: Wait, hold on, hold on. Are you talking about details in the other people's complaints?

MS. FISCHER: I'm saying detail in terms of the information brought to Collins' attention.

THE COURT: Right. In the complaint.

MS. FISCHER: I mean, is --

THE COURT: So you only have to -- you don't have to search for, you know, toxic environment complaints; you have to look for sexual harassment and sexual misconduct complaints. That's the way Judge Abrams explains it, and I think it makes perfect sense. So if

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those are being brought to Collins' attention by anybody in HR, even if they weren't made to Collins herself, that seems to me it's fair game, unless you can show me that --

MS. FISCHER: Okay. So that o--

THE COURT: -- she's in a tunnel, a bubble.

MS. FISCHER: I do not think she's in a bubble, and I think the explanation that your Honor just provided was very helpful, that if something was brought to -- it's not just something that may have been handled by someone else in HR; it would have to have been brought to Ms. Collins' attention in order for it to be relevant to that --

THE COURT: Right. But I think it's going to be a little hard for you to say -- I don't think you're going to be able to do this document production by saying I'm going to now get all the -- let's say there's, you know, twenty HR complaints in the relevant time period to HR. Now I'm going to go through those twenty and ask Ms. Collins if she heard about those. I don't think I want you to do that process. I think that's a process -- I think that it's not appropriate for the defendants to screen that way.

It's certainly fair for Collins to say at a deposition or in an affidavit or any other time she never

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knew about any of this, but I'm not going to take away from plaintiff the possibility of saying to Collins, "Boy, you never heard about person X? You never heard about person Y? It's in the same HR department as you." You're going to have to show she's in a bubble before I would say that she literally doesn't talk to people, not about these particular complaints, but because there's some office that's so far flung, it can -- you know, in another city or whatever it is, and we never talked about it, about their own complaints. If you could provide some evidence like that generically, maybe I would allow you to limit it. But you shouldn't otherwise assume that's what's going to happen.

MS. FISCHER: Okay.

THE COURT: Okay. Let's --

MS. FISCHER: I'm --

THE COURT: -- I'd like to hear the next issue unless you have something more on this.

MS. FISCHER: I do have one other question, which is the ruling was that there would be discovery of complaints within some reasonable time period before Ms. Eckhart complained, and I was just wondering if there's any further direction on that point.

THE COURT: Well, no one presented it to me as

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an issue. So is it an issue? I guess you didn't want to do it at all. How many years were you going back, Mr. Varghese?

MR. VARGHESE: I think we said 2015, which is five years before her complaint. And I can -- I mean, I think it's something we could -- like, I could work out with Fox. But, I mean, I'm happy to hash out --

THE COURT: Okay, was she there for five years beforehand?

MR. VARGHESE: She was there for -- she was there for more than five years before it.

THE COURT: Okay. I mean, I was going to say four or five. So four and a half. How's that?

Okay, let's go to the next issue. I'll hear from plaintiff.

MR. VARGHESE: Thank you, your Honor. I mean, the next issue are documents concerning Ed Henry's travel and expenses in this case. The reason that we sought these documents is that defendant Henry argued that in the context of plaintiff's TBPA and Gender-Motivated Violence Act claims, that she cannot just rely on his treatment of her and that instead she has to show some kind of pattern or modus operandi. We don't necessarily agree with that, but again we do think we should be entitled to take

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discovery on this issue, on the issue of his treatment of other individuals to the extent that they were similar to his treatment of Ms. Eckhart so in the event that he makes the same argument at summary judgment, we do have, besides our legal arguments on that point, we do have evidence that we can point to, as well, that shows that, for example -- I mean, one of the things we've asked for in this case are complaints by other women that Ed Henry harassed them. Presumably, once we get those information, we can look at his travel expenses and his travel itinerary and see if this person complained he harassed them in, you know, New York in January 2016, and Ed Henry was in New York in January 2016 working for Fox. And so that's why we think we're entitled to this information. And I don't really see what the burden is in terms of producing a single employee's travel itinerary and expense reports. You know, and to the extent that they need to be more confidential, I mean, that's fine.

THE COURT: Ms. Fischer?

MS. FISCHER: I think the issue is we don't -- it's unclear what plaintiff is seeking, given that we've already produced four years of Mr. Henry's expenses, which were in our initial production last month. Those were collected by outside counsel at a different firm that

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investigated Ms. Eckhart's allegation. So we've
produced --

THE COURT: And that -- okay, I now recall your
saying this.

Let's get Mr. Varghese's -- why isn't that
enough, Mr. Varghese?

MR. VARGHESE: Well, two things. One, I don't
know that the way that it was framed to us is that they
collected the expenses, stopping at June of 2018. I don't
see any reason why they can't produce his expenses from
June 2018 till he was terminated. If he engaged in
similar conduct after June 2018, that would still be
relevant. It doesn't mean -- June 2018 seems to me an
arbitrary cutoff. I don't see any reason why we shouldn't
get the remainder of his expenses.

THE COURT: How much longer was he there? How
much longer was he there?

MR. VARGHESE: I believe it was until -- I'm not
sure of the exact date in 2020 -- it was two years -- two
more years.

And then the only other point I would make is
I'm not -- and maybe this is all of the documentation they
have about his business-related travel during that time
period -- but I didn't see anything that would give us the

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indication that this also covered his travel schedule while working for Fox, you know, when he was on assignment, when he traveled to different areas, different parts of the country, etc.

THE COURT: It only had what, then?

MR. VARGHESE: It was his expense report.

THE COURT: As opposed to -- I'm sorry, what didn't it have? What's supposed to --

MR. VARGHESE: His travel -- any kind of travel reports, you know, to the extent that he was assigned to go to -- to the extent he was posted anywhere but didn't submit expenses with that, I mean, I would think that wouldn't be very burdensome to produce.

THE COURT: I've totally lost you. You think that he traveled somewhere but didn't put in for expenses?

MR. VARGHESE: Well, I guess that's my point. I don't know that -- if it's Fox's position that this is all there is about his travel, then that's fine. That just wasn't clear to me based on their production. If there are --

THE COURT: Oh, all right.

MR. VARGHESE: -- if there are additional documents about his travel that are not contained in what has been produced to us --

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THE COURT: I mean, I'm a little confused, though, about this post -- I'm confused about this post June 2018 period. The travel report or expense report, whatever it is, it seems to me is the tail of a dog, and the dog is what he was actually, you know, doing during this period. What is the -- I just -- it's hard to understand how an expense report's going to show you anything. I mean, it's not going to show you harassment.

MR. VARGHESE: Well, again, it's hard to say this without getting all of the discovery. But, again, hypothetically, we haven't received the complaints made by other women about Henry yet.

THE COURT: No, but you've seen this investigation file with the expense reports, right?

MR. VARGHESE: We've seen the expense reports, but, for example, let's say that in his expense reports he has an expense for a January 1, 2017, at the Marriott in New York City; and then when we get the complaints of discrimination made or the complaints of mistreatment by other women and one of those women says he made -- and he engaged in inappropriate conduct with me at the Marriott Hotel in January of 2017, that would show -- and, again, we don't necessarily agree that our client needs to show that he engaged in a modus operandi or treated other women

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the same way that he did in order to make out the claims; but the fact remains it is a defense that he has raised. And to the extent that the expense reports and his travel itinerary help us show that while he was traveling for Fox in other instances, he harassed other women or engaged in misconduct with other women, that would go to rebut that potential argument.

THE COURT: Ms. Fischer?

MS. FISCHER: I don't think the reports are going to show one way or another whether he harassed anybody. What has been alluded to is that there may be -- and, you know, we agree to look for any other complaints against Mr. Henry. And I guess what's being said here is that there might be some corroborating evidence in the expense reports. But the expense reports are really beside the point. They're not going to show who he was with. They're not going to show what he was doing with people behind closed doors, if anything, who he was having dinner with, who he, you know, was traveling with and what-have-you. So these expense reports really show nothing.

And it's important to note, you know, plaintiff has now said he wants the expense reports from 2018 until 2020. The allegation in this case of sexual harassment is

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that Mr. Henry sexually assaulted Ms. Eckhart in February of 2017. And because Mr. Henry was a coworker and not a supervisor of Ms. Eckhart, Fox can only be liable for that conduct if it knew or should have known of the harassment. And, certainly, any conduct that may have occurred after 2018 has nothing -- it's not in dispute; there was no further sexual contact between Ms. Eckhart and Mr. Henry after 2017, after early 2017. You know, what happened in 2019, what happened in 2020 is not relevant, in any event. But the expense reports won't get you there. The expense reports are not going to inform on the question of was he harassing other women or not, and certainly not what Fox knew about it.

THE COURT: Right. Well, they want that as corroboration. I mean, I agree it's of limited utility. But it seems like the burden is virtually zero. I mean, is there any real burden to this?

MS. FISCHER: It depends what's being sought. I mean, the expense reports can be produced. I'm not sure what was asked for in terms of like travel logs or something. I'm not sure that that's a document that exists. I think the expense reports indicate where expenses were incurred, the city and state in which expenses were incurred. I mean --

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THE COURT: Right.

MS. FISCHER: -- it's not relevant.

THE COURT: Well, it's very tangentially relevant for corroborative purposes. So I'm going to -- and since it seems like there's literally almost no burden to producing the expense reports, don't worry about whatever this travel thing is, because it seems like the thing we do know about are the expense reports. They were in the investigation file and you've referred to them. So produce the expense reports until his termination. If there's some burden to it, you can come back to me.

Any --

MS. FISCHER: Thank you.

THE COURT: -- questions about the ruling from plaintiff?

MR. VARGHESE: No, your Honor.

THE COURT: From defendant?

MS. FISCHER: No, your Honor.

THE COURT: Okay, let's go to the next issue. Mr. Varghese?

MR. VARGHESE: Thank you, your Honor. The next issue are we are seeking documents concerning exit interviews conducted at Fox from 2018 to the present. The reason that we are seeking these documents is that, as I

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mentioned earlier, part of our client's allegations in this case is that she was asked by Ms. Collins whether she had ever been subject to sexual harassment or assault during her employment at Fox and that this is evidence that they understood her earlier complaints to implicate issues of sexual harassment and sexual assault. And Fox had said in its motion to dismiss that this was a standard question that did not demonstrate any knowledge on its part. And this is something that Judge Abrams spoke to in her decision. I believe that it was on the same page 39 about -- yeah, it's --

THE COURT: Yes, 39, yes, yes.

MR. VARGHESE: Yes. And so that's why we want it, to see whether and in what circumstances this kind of question was asked to employees who were leaving Fox and whether in fact it was a standard question or it was a question only asked of specific individuals and if it was only asked of specific individuals what did they have in common, it's if our belief is that they only asked those questions when they believed that the employee was subject to sexual harassment or assault.

THE COURT: Okay. Ms. Fischer.

MS. FISCHER: If the question is was this a standard question or not, there's a much easier way to get

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2 at that. This is one that really is much more easily
3 directed as a deposition question. It could potentially
4 be answered with a yes or no; now, "Is this a standard
5 question, and who did you ask this question to?"

6 Notes from exit interviews with third parties
7 will undoubtedly contain sensitive and irrelevant
8 information. These are people who are leaving the company
9 for any number of reasons. And the notes from those
10 meetings won't necessarily inform on this issue. The
11 question of whether it was Fox's practice to ask this
12 question should be directed at Ms. Collins, and it can be
13 -- and an answer could be given on that. It would be
14 incredibly --

15 THE COURT: Did she use a checklist? Is there
16 like some checklist for exit interviews? You would think
17 so. Do you know?

18 MS. FISCHER: I don't know. I don't know. But
19 we -- you know, that's something we could look into.

20 THE COURT: Yes, I mean, I'm wondering if it's a
21 free-for-all or if people have a protocol, and is there a
22 manual about what you ask in an exit interview.

23 Anyway, here's my ruling on that. You should
24 certainly produce any manual, any checklist, anything else
25 about how exit interviews are conducted. Otherwise, it

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should be dealt with in a deposition question.

All right, next issue. Job duties --

MR. VARGHESE: The --

THE COURT: Sorry? Mr. Varghese?

MR. VARGHESE: I'm sorry, I didn't mean to cut your Honor off. Your Honor, so the next issue is the job duties and specifically his role with different programs that --

THE COURT: Well, I mean, it's hard -- I read your piece and I read the other side's piece. And, you know, we have to do this by the actual interrogatories, not by some characterization of job duties. And I just -- I can't even tell what the dispute is. I mean, if you've gotten his personnel file and employment agreements and so forth, what is it you need?

MR. VARGHESE: Well, the personnel file and the employment agreements don't speak to what he was able to or not able to do in terms of, you know, one of the issues in this case was was it reasonable for Ms. Eckhart to rely on his statements that he could increase her on-air visibility or have her as an honored guest on his shows. But the documents that we've seen don't really speak to whether or not he had that kind of power. And if in the negotiation or creation of those shows that kind of thing

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was discussed about who would have that role or whether Ed Henry had any say in that, that would all be relevant. That's why we asked for the specific programs and segments that he worked on, because the question is did he have the ability to make the kind of promises that he made, and if so, then his argument that Ms. Eckhart should have known that he couldn't do that falls by the wayside. Obviously, if he could do it and there are documents or contracts or negotiations in which he reserved for himself the right to have some say over, you know, who his contributors are, who people that appear on air are, that would be relevant in this case. And so that is why we did it in the more granular level that we did instead of asking for a specific document about just the job duties that was in his personnel file, because in our experience, that kind of thing -- it's not always in there. That's why we were looking at other avenues where this kind of information could be found.

THE COURT: Okay. So you're interested in documents that would state one way or the other whether he could decide who appears on air?

MR. VARGHESE: Yes, whether he could decide who appears on the programs that he had or that he was negotiating on.

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THE COURT: That's much narrower than what you had. Defendants may still have an objection. But if you were going to get something, that seems to me is the most you would get, which is are there documents that reflect one way or the other as to whether had the ability to decide who appears on air when he's hosting.

Okay, so with that narrowed in that way, Ms. Fischer, what's the objection?

MS. FISCHER: I'm just not sure what we would be looking for, because his authority, you know, what the responsibilities of his role are and authority in his role would be in the contract. I mean, if there was some back-and-forth before the entry of those contracts, that doesn't go to the ultimate question of what he's permitted to do under his contract.

THE COURT: Well, yes, but there are things -- I'm not saying that -- we still have to deal with how we would find such documents and whether it's reasonable to ask you to look for them; and if so, how. That's a different question. But on a question of just pure relevance, you know, an employee -- I've seen hundreds of employees' contracts, and they don't spell out everything. And, you know, they say some generic thing about what your duties are, but they may not say something as granular as

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this. And that might be the subject merely of oral negotiation that say, yeah, now that you're in this job, you get to pick who appears on the air. Of, if an email, you know, now that you're in the job, you get to pick on the air. Or an email that says all selection of guests is done by this person. So if that existed, that's relevant.

Now, if it's too burdensome to find this, then that's a different question. So on the pure relevance question, it seems relevant to me. So if you want to talk about, you know, how to find this, it might not -- I mean, maybe the answer is you -- you know it's all in someone's head, and you'd have to depose whoever was involved in producing the shows to get the answer to that question. But maybe there's a way to get something that could be written. I don't know. Maybe you want to think about it.

MS. FISCHER: Well, if the documents are not -- on the relevance piece, you know, it doesn't go to whether she was harassed, it doesn't go to what Fox knew about it, it doesn't go to whether there was retaliation. But in terms of how we find the documents, if it's not in his contract and if it's not in his personnel file, I'm just not sure that there's another repository where this could be obtained, if it exists.

THE COURT: All right, well, that may not be

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unreasonable. I mean, Mr. Varghese, this may be something that you have to ask people to find out how that particular aspect of the job was done.

MR. VARGHESE: I think -- I mean, look, to Ms. Fischer's point, if the document doesn't exist, it doesn't exist. Again, obviously, they don't have to create something out of whole cloth to respond to a document request. But I don't think there are -- you know, there are specific programs and segments that we identified here. I don't think it would be that difficult to go to the emails in the time period that those programs and segments were being produced and at least make a reasonable search to see if there is anything responsive to these requests. Again, if there's not, then that's fine. But I think --

THE COURT: Well, maybe we need to deal with this in part two. There may not be a way to do this or there may be a way to do this that gets some limited number of responsive documents. So the ruling is this fairly narrow thing is relevant; and whether there's a reasonable way to get it, it seems to me, is going to be conducted through email searches. And if you can't agree, I'm sure it will come to me.

All right, let's go to the next issue. I think

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it's the last one. Hold on. Before anyone talks, let me just look at this.

Yes, I don't need to hear argument on this. The plaintiff knows her complaints. So if she wants to refer to the specific complaint and ask who has knowledge of it, she can do that. But the term "complaints" is too generic.

Any questions, Mr. Varghese?

MR. VARGHESE: No, your Honor.

THE COURT: Ms. Fischer, any questions?

MS. FISCHER: no, your Honor.

THE COURT: Okay, so on the ESI, Mr. Henry apparently feels he wasn't involved in this. And he's, you know, you've got to redo this with Mr. Henry being involved. And I'm not convinced that -- it's pretty rare anymore that people come to me and say, "Judge, pick the search terms." Usually people, like, run the search terms and say -- and they talk to the other side and they say, "This is crazy. This comes up with 100,000 documents. Let's talk about what we can do to get things to a reasonable number here." And after they've gone through that whole process, then sometimes they come to me and they say, "Judge, they want to run this term. It comes up with 5,000 documents. We want to do this term; it comes

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up to 500. You know, we did a sample of theirs, and here's all the irrelevant ones that we got when we did the 5,000. So this is obviously a complete waste of time as part of the process, too." And then I have a reasoned judgment for picking among search terms. Is that process skipped, is it planned, did I not read the letters carefully enough? I admit I just skimmed them. Is that something that's going to happen or not?

MR. VARGHESE: Do you want me to --

THE COURT: I think the defendants really are the ones who should answer that.

MR. VARGHESE: Okay.

MS. FISCHER: So we have been engaging in that process, and in our meet-and-confers with plaintiff's counsel, you know, there have been search terms where we've been able to explain, you know, this is a term that's hitting on X hits; and we looked at 200 of them or whatever, and, you know, none of them were relevant, and we have been able to narrow the terms in that way. I do think in light of the Court's ruling today, particularly about other complaints of discrimination, I think that, you know, that really -- that was a major dispute on the ESI. So I think that we are in the -- I think that, you know, given that, I think we have some direction on where

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the ESI is going, based on the Court's ruling.

THE COURT: Okay. Did I read the letters --

MS. FISCHER: But we have been involved --

THE COURT: I mean, have you been doing sampling
and so forth?

MS. FISCHER: Yes, yes, we absolutely have.
We've had several conversations with plaintiff's counsel,
we've been exchanging hit -- we've been providing the hit
reports. And where there have been words that have been
hitting, you know, "overhitting," as we would say, we
provide an explanation. You know, we've done those types
of test searches; we've been doing all of that.

THE COURT: Okay. Good. So I'd like people to
come back to me. I would love it if you could do it in a
joint letter that kind of starkly lays out -- if you can't
agree -- that starkly lays out the choices. You know, we
do this search and we end up with this many hits, and we
do it the plaintiff's way and it's that many hits, and
it's going to take us X number of hours, and so forth. It
would be great to have it as a joint letter issue by
issue. But if that's proving too unwieldy, you can use
the usual process. But I'm going to ignore the current
letters because Mr. Henry wasn't involved.

MS. FISCHER: Thank you, your Honor.

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THE COURT: Okay. Any -- I think we're done.
Any questions or anything further from the plaintiff's
side?

MR. VARGHESE: No, I don't see anything.

THE COURT: Ms. Fischer, anything further?

MS. FISCHER: Nothing further.

THE COURT: And Mr. Henry's lawyer, I'm sorry, I
wrote down your name and --

MS. FOTI: It's Ms. Foti, yes, Catherine Foti.
No, you've --

THE COURT: Ms. Foti, anything further from you?

MS. FOTI: No, your Honor. You've dealt with
our issues. Thank you.

THE COURT: Okay. Thank you, everyone. Good-
bye.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Eckhart et al v. Fox News Network, LLC et al, Docket #20-cv-05593-RA-GWG, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: February 16, 2022